

**BEFORE SH. S.C YADAV, COMMISSIONER
(UNDER EMPLOYEES' COMPENSATION ACT, 1923)
LABOUR DEPARTMENT, GOVT. OF N.C.T. OF DELHI
5, SHAM NATH MARG, DELHI-110054**

CEC/D/WD/47/18/ 464.

Dated: 31/03/2021.

IN THE MATTER OF:

Smt. Kiran Gupta & Ors.

R/o. S-221/41, 4th Floor, Vishnu Garden,
Delhi

..... Claimant/Petitioner

V/s

Sh. Himanshu Malhotra

S/o Sh. Subhash Chandra Malhotra
R/o BF-103, East Shalimarbagh, ND-110088

....Respondent No. 1

M/s National Insurance Company Ltd.

Branch Alipur Khasra No. 74/31,
Main GT Road, Opp. Shradhanand College,
Alipur, ND-110036

....Respondent No. 2

ORDER

1. Vide this order I will disposed of claim application dated 26/09/2018 filed by claimant under section 22 of the Employee's Compensation Act, 1923. (Herein after referred as an Act) for seeking death compensation against the respondents jointly or severely.
2. The petitioner being the legal heirs of the deceased workman Sh. Kunal Gupta @ Kunal s/o Sh. Ram Gopal has filed this claim against the respondents for seeking death compensation under the Act. The petitioner No.1 wife of deceased submitted that her husband Sh. Kunal Gupta @ Kunal was employed by respondent no 1 as a driver on vehicle bearing No DL-IRT-4431 (Wagon-R Taxi) on last drawn wages Rs. 15000/- per month. On 30/10/2016 at about 3.20 AM night while the deceased was driving the vehicle in question he met with an accident at road no. 28 near Kipari wala Mandir, Gorewala Mandir to Rajdhani college road, Delhi under jurisdiction of Rajouri Garden jurisdiction. It is further submitted that deceased workman was driving Wagon-R taxi in question alongwith passengers who were sitting in vehicle in question and going towards Janakpuri, New Delhi



after finishing tour, when he reached at Kipari Wala Mandir, Road No 28 after crossing Shivaji College red-light suddenly vehicle in question misbalanced and hit with prti of road with great force and vehicle turned-truled on the road with great force and deceased workman/driver died on the spot it is further submitted that vehicle bearing No DL-IRT-4431 (Wagon-R taxi) was insured with respondent no 2 M/s National Insurance co. Ltd. vide policy No 36080431161000089 for the period from 08/05/2016 to midnight 17/05/2017. After the accident claimants approached to respondent no 1 for the payment of compensation but respondent no 1 ignored the issue of making payment to the claimants, on one pretext or the other thereafter notice was sent to respondent no 1 by the claimants through there counsel but both the respondent no 1 & 2 did not make the payment to the claimants. Further claimants submitted that since accident of deceased workman was occurred out of and in the course of his employment as such claimants are entitled to receive Rs 2000000/- as compensation along with interest and penalty under the Act. The claimants have withdrawn the DAR MACT case from the court of Ms Himani Malhotra Ld. Judge MACT, Tis Hazari Court on 15/02/2018 with liberty to file Workmen compensation case under the provision of EC, Act 1923.

In the last claimant prayed that direction to be issued to the respondents to pay death compensation to the claimants under the Act. Along with claim petition claimant filed order of MACT court dated 15/02/2018 copy of FIR bearing No 859/16, accident place map, driving licence of deceased Kunal Gupta, permit of Contract carriage, insurance certificate Post-mortem report bearing no 1809/2016 dated 31/10/2016, birth certificate, Aadhar card of claimants and deceased Sh. Kunal.

3. On the basis of claim petition summons were issued to the respondents with direction to appear before this authority to file reply/defence if any in this matter. Respondents appeared and filed reply. Resp. No 1 submitted therein that present claim application is not legally maintainable in the eyes of law and same is liable to be dismissed with heavy cost as the claimant has not come to this Hon'ble Court with clean hands and has suppressed the material and true facts of the case as such claim application is deserved for dismissal. It is further submitted that the claim application of the claimant is without any legal and valid cause of action for filing the present claim against the Resp. No 1 as such respondent has nothing to do with alleged incident on this ground claim is liable to be dismissed. Further respondent submitted that present claim application of the claimant is based upon false and frivolous facts hence the claimant is not entitled for any discretionary relief from this Court as this claim has been filed for self motivated reason to extract money from respondent no 1 and to harass the respondent. Further it is submitted



that decease Kunal Gupta was permanent driver of respondent no 1 on last drawn wages Rs. 15000/- per month along with extra allowances. Further respondent admitted factum of accident occurred on 31/10/2016 as admitted Para 2 of the claim petition. On the day of accident vehicle in question was insured with respondent no 2 Insurance Co. vide policy No 360804311610000989 for the period of 18/05/2016 to midnight 17/05/2017. In the last respondent prayed that the present claim application of the claimant may be considered for respondent No 2 Ins. Co. for compensation if any under the Act.

4. Respondent no 2 Insurance co. also filed reply on record, wherein it is submitted that no statutory notice of the alleged accident was ever served upon respondent no. 2, hence present claim application is deserved for dismissal under the provisions of section 10 of the EC Act, 1923. Further submitted that in absence of any cogent proof of the employee-employer relationship between claimant and resp. No 1 claim petition is liable for dismissal. Further respondent submitted that as per the affidavit of respondent no 1, (registered owner of the vehicle in question) dated 08/03/2017 placed before the Court of Himani Malhotra PO MACT Tis Hazari Court, Delhi, the offending vehicles was rented out to the deceased by the resp. no 1 in view of this fact the employer-employee relationship between the deceased and resp. no 1 does not exist hence respondent no 2 is not liable to compensate the petitioners under EC Act, 1923 (affidavit has been placed on record). It is further submitted that the present claim petition is devoid on merits and has been filed by the petitioners, in collusion with respondent no 1, just to extract money from the answering respondent and hence deserve dismissal. Further petitioner has not produced before this tribunal some vital documents such as mechanical inspection report of the vehicle, complete criminal record including statements of eyewitness, MLC of other victims of the accident in absence of which, the respondent no 2 denies any accident as well as any liability in the present claim. Further it is submitted that in view of the fact that section 3/181 and 5/180 of the MV Act has been included in the charge sheet which clearly depicts the breach of terms of the Insurance Policy hence respondent no. 2 is not liable to pay compensation to the petitioner. Further respondent submitted without prejudice that the accident if any, had occurred due to the own negligence of the deceased, hence the Resp No 2 is not liable to pay compensation to the petitioner. In principle resp. no 2 admitted coverage of vehicle in question in the name of Mr. Himanshu Malhotra vide policy No. 360804311610000989 valid from 18/05/2016 till 17/05/2016 rest of other contents denied by resp no 2 and prayed that the claim of petitioner be considered against respondent



- no 1. Resp No 2 also filed reply of Show cause notice under section 4A (3) of the Act denying there liability for any penalty.
5. Claimant filed rejoinder in response to reply filed by respondent No 1 & 2 reiterated contents of their claim petition.
6. On 15/07/2019 following issues are framed for adjudication by the then Ld. Commissioner for adjudication:
1. Whether the dependants of deceased Sh. Kunal Gupta are entitled to compensation under EC Act 1923?
 2. Whether the injuries sustained by Sh. Kunal Gupta which resulted into his death in and out of the employment of respondent and if so what amount be claimant are entitled and what directions are necessary in this regard?
 3. Relief, if any?
7. Matter was fixed for the evidence of claimant on 31/07/2019 Sh. Ram Gopal Gupta Petitioner No 4 father of deceased, filed his statement by way of affidavit Ex CW1/. on behalf of all the claimants. The contents of affidavit are corroborative to those in claim petition. Ex.CW1/A also filed copy of Aadhar Card of himself and wife of deceased Smt. Saroj Gupta and driving licence of deceased Sh. Kunal Gupta. He tendered his affidavit on 21/08/2019 and 09/09/2019, he was also cross examined by counsel of respondent no 1 on 09/09/2019. For respondent no 2 Sh. Sovit Kumar R2W1/A appeared in witness box and filed his evidence by way of affidavit Ex R2W1/A. The contents of affidavit are corroborative to those of reply he was also cross examined by counsel for petitioner on 26/11/2019. R2W1/A also filed documents mark A copy of FIR dated 31/10/2018 bearing no 0859/16, Mark B affidavit dated 08/03/2017 of respondent no 1 Sh. Himanshu Malhotra, Ex R2W1/1 notice from counsel for R2 to petitioners and respondent No 1 dated 26/09/2019 postal receipt, Ex R2W1/3 policy certificate bearing No 360804311610000989.
8. For resp No 1 Sh. Himanshu Malhotra filed his affidavit Ex. RW1/A. He has also tendered his affidavit on 05/12/2019 and cross examined by counsel for claimant on 05/12/2019 and on 11/12/2019 and also cross examined by counsel for R2.
9. Resp No 1 & 2 also filed written argument on record. Counsel for petitioner made oral submission on 25/02/2021.



10. On the basis of pleadings of the parties, documents available on record and evidence lead in the matter I am giving my findings on the issues framed in the matter as under:

Issue No 1 & 2

The case of claimant is this that deceased workman Sh. Kunal Gupta @ Kunal was employed with respondent no 1 as a driver on vehicle bearing No DL-1RT-4431 (Wagon R taxi) on last drawn wages of Rs. 15000/- per month. On 30/10/2016 at 03:20 AM (night) while the deceased was driving the vehicle in question he met with an accident at Road no 28, near Kipari Wala Mandir, Gore Wala Mandir, Rajdhani College Road, under PS Rajauri Garden. It is further said that the workman/driver was driving vehicle in question and going towards Janakpuri, New Delhi alongwith passengers who were sitting in vehicle in question after finishing tour. When vehicle reached at Kipari Wala Mandir, Road No 28 after crossing Shivaji College Red Light suddenly a Wagon R taxi in question dis-balanced and hit with a part of road with great force and vehicle in question turned-trueld on the road with a great force and workman/driver died on the spot. At the time of accident vehicle in question was insured but despite having knowledge of accident no compensation was paid to the petitioners.

In reply respondent no 1 admitted factum of employee-employer relationship and accident cause out of and in the course of his employment, resulting thereby deceased namely Kunal Gupta was died. R1 also admitted last drawn wages Rs. 15000/- per month of the deceased employee. Respondent No 1 in chief and cross examination admitted employee-employer relationship with deceased employee Kunal Gupta and accident occurred out of and in the course of his employment.

Respondent No 2 Insurance Co. denied the employee-employer relationship with petitioner and respondent No 1. Further respondent no 2 placed on record that respondent no 1 in his affidavit dated 28/03/2017 placed before the Court of Ms. Himani Malhotra PO-MACT, Tis Hazari Courts, Delhi that offended vehicle was rented out to the deceased by respondent no 1, photocopy of affidavit Mark B to sheets colly placed on record from this documents it appears that resp No. 1 had rented vehicle No DL-1RT-4431 Wagon R, Chasis No 885432 to Sh. Kunal Gupta s/o Sh. Ram Gopal Gupta, R/o F-194, JJ Colony, Raghuvir Nagar, ND-110027 on Rs. 27,000/- per month which attested by notary public Delhi on 08/05/2017. From this documents it appears that resp No 1 had rented vehicle in question to deceased on monthly Rs 27,000/-. Thus it proves that there was no employee-employer relationship with resp No 1 and deceased employee.



As per section 2 (1)(d)(d) employee means :

"[(dd) "employee" means a person, who is--

(i) a railway servant as defined in clause (34) of section 2 of the Railways Act, 1989 (24 of 1989), not permanently employed in any administrative district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II; or

(ii) (a) a master, seaman or other member of the crew of a ship,

(b) a captain or other member of the crew of an aircraft,

(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle,

(d) a person recruited for work abroad by a company,

and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India; or

(iii) employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to any employee who has been injured shall, where the employee is dead, include a reference to his dependants or any of them;]"

As per section 2(1)(e) employer define :

" (e) "employer" includes anybody of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer, and, when the services of a ⁶[employee] are temporarily lent or let on hire to another person by the person with whom the ⁶[employee] has entered into a contract of service or apprenticeship, means-such other person while the ⁶[employee] is working for him;"

As per definition of employee there must be casual or permanent relationship of master and servant and for work executed by the employee master/employers has to pay salary on the basis of daily/monthly or any mode only than a person can falls under the definition of employee. Further employers only can define when he comes u/s 2(1)(e) of the Act.

From the aforesaid discussion I have come to this conclusion that deceased was not engaged as a employee as no documents has been placed on record by either petitioners side or resp. No 1 to establish employer-employee relationship, such as appointment letter, i-Card, Wage Slip, wage sheet or attendance record. The documents as discussed are the statutory documents and onus has been casted upon respondent no 1, to file on record to substantiate contents of his reply but here nothing has been brought on



record, merely saying on orally does not prove employee-employer relationship between resp. No 1 and deceased employee. Further as per affidavit it is very much clear that vehicle in question was rented out to the deceased on Rs 27,000/- per month which was being paid to Resp. No 1 by deceased employee. Further Sh. Jagdish @ Golu who is the complainant to lodge FIR Mark/A in this case also disclosed that on 30/10/2016 at 09:00 PM Sh. Kunal Gupta was came with his friend Raman and Karan to celebrate Diwali at his house.

11. In view of above discussion and circumstances petitioners failed to establish employee-employer relationship with respondent No 1 and accident resulting in death of deceased Sh. Kunal Gupta does not constitute accident arising out of and in the course of his employment as such claimants failed to establish their case as such claimants are not entitled for any relief. Accordingly case is not fit for, awarding any relief.

12. Accordingly all issues are decided against the claimants.

13. Given under my hand and seal of this Authority on this 31st day of March, 2021.

(S.C. Yadav)
Commissioner

Employee's Compensation Act, 1923

